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17 UNITED STATES DISTRICT COURT

18 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

21 MASIMO CORPORATION,

22 Plaintiff,

23 vs.

24 POLITAN CAPITAL
MANAGEMENT LP, et al.,

25 Defendants.

Case No. 8:24-cv-01568-JVS-JDE

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S SUPPLEMENTAL
BRIEFING**

Judge: Hon. James V. Selna
Ctrm: 10C

Defendants submit this response to Plaintiff Masimo’s September 4, 2024 supplemental brief (“Br.,” Dkt. No. 151) pursuant to the Court’s August 29, 2024 Minute Order (“Order,” Dkt. No. 136).

I. THE ANSWER TO THE COURT’S QUESTION IS YES.

Masimo does not answer the question the Court asked: Whether Masimo’s failure to plead loss causation “bars this Court from issuing a preliminary injunction where only equitable relief is sought by the plaintiff.” Order 2. The answer is “yes.” The Court cannot order as preliminary relief what it cannot order as final relief. *De Beers Consol. Mines v. U.S.*, 325 U.S. 212, 220 (1945). Accordingly, the failure to allege an essential element of a claim, here loss causation, is fatal to a preliminary injunction motion. *See, e.g., Eisner v. Meta Platforms, Inc.*, 2024 WL 3228089 (N.D. Cal. June 28, 2024). Masimo argues instead that it has alleged loss causation. Masimo is wrong for the reasons below.¹

II. ADVISORY FEES ARE NOT COGNIZABLE ECONOMIC LOSSES

Masimo claims that it adequately pled loss causation for purposes of its Section 14(a) claim based on the fees it paid advisors and lawyers in the proxy contest and related litigation (the “Advisory Fees”).² Not so. In almost all cases, “losses caused by the election of directors are simply too indirect to find an ‘essential link’ under Section 14(a).” *City of Pontiac Gen. Emps.’ Ret. Sys. v. Bush*, 2022 WL 1467773, at *5 (N.D. Cal. Mar. 1, 2022).

A plaintiff must allege that the misleading proxy statement “caused the plaintiff injury *and* that the proxy solicitation itself, rather than the particular defect

¹ In a footnote, Masimo requests leave to amend. Because any amendment would be futile, leave should be denied. The Advisory Fees cannot, as a matter of law, constitute losses for loss causation, and the allegations cannot, as a matter of law, fit into any purported exception created by *Wells Fargo*.

² No Advisory Fees are actually alleged in Masimo’s Amended Complaint. (Dkt. No. 132.) The two complaint paragraphs Masimo cites to in its brief are sweeping, conclusory allegations devoid of any detail. Br. 2 (citing Am. Compl. ¶¶ 268, 271).

1 in the solicitation materials, was an essential link in the accomplishment of the
2 transaction.” *N.Y. City Emps.’ Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir.
3 2010) (subsequent history omitted) (cleaned up and emphasis added). “In well-
4 pleaded Section 14(a) claims, loss causation connects the proxy misstatements with
5 an actual economic harm.” *Id.* at 1023.

6 Loss causation “can only be established when the proxy statement at issue
7 *directly authorizes* the loss-generating corporate action.” *Advanced Advisors G. P.*
8 *v. Berman*, 2014 WL 12772264, at *14 (C.D. Cal. Sept. 16, 2014) (quoting *Kelley v.*
9 *Rambus, Inc.*, 2008 WL 5170598, at *7 (N.D. Cal. Dec. 9, 2008), *aff’d*, 384 F.
10 App’x 570 (9th Cir. 2010)) (emphasis in original). Accordingly, “[c]ourts
11 **routinely reject Section 14(a) claims based on the election of directors because**
12 **the losses are indirect.**” *City of Pontiac*, 2022 WL 1467773, at *5 (cleaned up and
13 emphasis added).³ The reason that allegations regarding director elections typically
14 fail is that the source of *the economic loss must be the transaction about which*
15 *investors were asked to vote.*

16 Masimo’s Advisory Fees cannot constitute economic loss for purposes of
17 loss causation because shareholders are not being asked to vote on the Advisory
18 Fees. Rather, they are being asked to vote on the election of directors. The
19 Advisory Fees were incurred incidentally to the proxy contest itself; they are not the
20 subject of the proxy contest. Indeed, no court in the Ninth Circuit has ever found
21 that proxy-related fees constitutes economic harm for purposes of for loss causation.

22 With no Ninth Circuit authority to rely on, Masimo spends nearly a third of its
23 brief urging the Court to follow *Enzo Biochem, Inc. v. Harbert Discovery Fund, LP*,
24 2021 WL 4443258 (S.D.N.Y. Sept. 27, 2021), an out-of-Circuit decision that has
25 never been followed by any court and that departs from this Circuit’s clear
26

27 ³ In contrast, loss causation is a lower pleading hurdle when the transaction at issue
28 is a merger or tender offer, as the alleged economic loss is directly tied to the subject
matter of the vote.

1 precedents (most of which Masimo fails to address in its brief).

2 Masimo misreads *Enzo* in any event. In *Enzo*, there were two proxy contests
3 at issue. In the 2019 contest, two shareholder-nominated directors were elected.
4 *Enzo* at 2-3. They served for less than a year then resigned, creating two vacancies.
5 *Id.* at 3. The company argued that misleading statements made in 2019 about
6 unqualified directors who did not serve out their terms *caused* there to be a second
7 proxy contest in 2020, *causing* the company to incur additional fees. *See*
8 *Memorandum of Law in Opposition to Motion to Dismiss* at 25, *Enzo*, 2021 WL
9 4443258 (No. 1:20-cv-09992-PAC), ECF No. 32. The following year, Judge Crotty,
10 the author of *Enzo*, made clear that *Enzo* turned on this particular fact pattern. *See*
11 *Rubenstein v. Adamany*, 2022 WL 6592503, at *6 n.8 (S.D.N.Y. Oct. 5, 2022).

12 As Judge Crotty explained in *Rubenstein*, “[u]nlike the *Enzo* proxy contest,
13 which may never have taken place if not for the misleading proxy ... the elections
14 here take place each year without fail.” *Id.* Masimo argues that this statement was
15 based on a distinction between contested and uncontested elections (Br. 4); it was
16 not. Judge Crotty was relying on the allegation that misleading 2019 proxy
17 statements had been the *cause* of the 2020 proxy contest, a unique fact pattern that
18 bears no resemblance to this case.

19 The Second Circuit’s affirmance of *Rubenstein* makes clear that *Enzo* is not
20 good law, even in the Second Circuit. The Second Circuit held that the plaintiff
21 failed to allege loss causation arising from excessive executive compensation:
22 “Because the shareholders did not *directly approve* of any aspect of executive
23 compensation, Rubenstein cannot plausibly allege that the misleading proxy
24 statements *caused* [the company] to pay millions of dollars in undisclosed
25 perquisites to its executives.” *Rubenstein v. Adamany*, 2023 WL 6119810, at *4 (2d
26 Cir. Sept. 19, 2023) (emphasis added). Just as the shareholders in *Rubenstein* did
27 not directly approve executive compensation, Masimo’s shareholders are not being
28 asked to directly approve Masimo’s Advisory Fees.

1 Finally, even if Advisory Fees were cognizable, Masimo’s argument that its
2 fees were incurred as a result of purported misstatements and omissions in this
3 year’s Proxy Materials is not true because Masimo would have incurred the fees
4 anyway. Last year, there was a hotly contested proxy contest, no Section 14(a)
5 claim was made, and Masimo issued responsive proxy statements to the same, if not
6 greater, extent that it did this year. *See* Swartz Decl. Exs. 1 to 9.

7 **III. MASIMO CANNOT RELY ON *WELLS FARGO***

8 As a Hail Mary, Masimo offers an “alternative” loss causation theory of
9 dubious validity, which, as even Masimo acknowledges, applies only where
10 directors are **re-elected** based on **ongoing fraudulent** conduct. Br. at 4-5.⁴
11 Masimo’s argument ignores its Amended Complaint, which focuses on the
12 purported need to “set the record straight” about alleged misstatements about
13 Quentin Koffey’s and Michelle Brennan’s service on the Masimo board. Am.
14 Compl. ¶ 24. But neither of them is up for re-election. This election concerns other
15 director candidates who are independent of Politan. Indeed, in its Amended
16 Complaint, Masimo removed those individuals as defendants, acknowledging that
17 their election would not harm the Company. *Compare* Compl. (Dkt. No. 1)
18 (including as defendants William Jellison and Darlene Solomon), *with* Am. Compl.

19 Masimo seeks to rely on *In re Wells Fargo & Co. Shareholder Derivative*
20 *Litigation*, 282 F. Supp. 3d 1074 (N.D. Cal. 2017), in which Judge Tigar departed
21 from the long-standing “principle articulated by Judge Alsup—and restated by other
22 courts in th[e] district”—that “[a] claim that the reelection of the directors was an
23 essential link to loss-generating corporate action because of the directors’
24 subsequent mismanagement cannot form the basis of liability under Section 14(a).”
25 *Id.* at 1102, 1105 n.11 (cleaned up). Judge Tigar departed from well-established
26 precedent on the ground that “Plaintiffs’ allegations go far beyond simple

27
28 ⁴ Masimo’s parentheticals of case descriptions acknowledge that they pertain to
votes to “re-elect” or for the “re-election” of board members. *Id.* at 5.

1 mismanagement” by alleging “that the Director Defendants perpetrated a fraud”
2 *Id.* at 1005. The Ninth Circuit has not adopted *Wells Fargo* and this Court has no
3 obligation follow it.⁵

4 The case arose out of Wells Fargo’s widespread practice of creating
5 fraudulent accounts to generate fees, a highly-publicized scandal that rocked the
6 banking industry. The plaintiff alleged that the board had played a direct role in this
7 fraudulent activity that was so extreme and damaging, such that their re-election was
8 itself a loss-causing transaction.

9 Masimo makes no comparable allegation. Moreover, central to the holding in
10 *Wells Fargo* was that the proxy related directly to re-electing directors who had
11 damaged the company through fraud. Here, no Defendant is up for re-election.
12 *Wells Fargo* has no bearing on this case and cannot excuse Masimo’s failure to
13 plead loss causation.

14 Masimo also relies on *Employees Retirement System of the City of St. Louis v.*
15 *Jones, et al.*, 2021 WL 1890490 (S.D. Ohio May 11, 2021), a case that cited *Wells*
16 *Fargo* and in which “plaintiffs allege[d] far more than mere mismanagement or an
17 isolated act” and instead “set forth in detail that the Director Defendants” up for re-
18 election had “orchestrat[ed] a large bribery, racketeering, and pay-to-play scheme
19 with Ohio politicians.” *Id.* at *1. The court there acknowledged that the loss
20 causation theory was justified only by the “unique nature” of the allegations. *Id.* at
21 *17. Here, again, none of the Defendants is up for re-election and none is alleged to
22 have engaged in an ongoing fraud or to have done anything remotely resembling
23 these extreme facts.

24
25 ⁵ See, e.g., *In re Paypal Holdings, Inc. S’holder Derivative Litig.*, 2018 WL 466527,
26 at *4 (N.D. Cal. Jan. 18, 2018); (distinguishing *Wells Fargo* on Section 14(a) loss
27 causation); *City of Detroit Police & Fire Ret. Sys. on Behalf of NiSource Inc. v.*
28 *Hamrock*, 2021 WL 877720, at *7 (D. Del. Mar. 9, 2021) (expressly declining to
follow *Wells Fargo* as being inconsistent with Third Circuit precedent).

1 DATED: September 6, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants, certifies that this brief does not exceed five (5) pages in length, and complies with the Court's order at Dkt. 136.

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